Samsung Electronics America, Inc. f/k/a Samsung Telecommunications America, LLC *and* Jorgie Franks. Case 12–CA–145083

February 3, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On August 18, 2015, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We affirm the judge's findings, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part ___ F.3d ___ (5th Cir. Oct. 26, 2015), that the Respondent violated Section 8(a)(1) of the Act by: (1) maintaining a "Mutual Agreement to Arbitrate Claims" (the Agreement) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial; and (2) enforcing the Agreement by demanding that plaintiffs withdraw a class action complaint in the United States District Court, Middle District of Florida, Tampa Division alleging Fair Labor Standard Act violations,[1] and filing a motion to dismiss the complaint and compel mediation/arbitration.[2]

For the reasons discussed below, we reverse the judge's finding that the Respondent unlawfully instructed employee Jorgie Franks not to discuss her lawsuit with other employees. However, also contrary to the judge, we find that the Respondent unlawfully interrogated Franks about her protected concerted activity on both September 3 and October 7, 2014.

I. FACTS

The Respondent is engaged in the distribution and sale of electronic and digital media products, mobile telephones, and other communications products for consumer and business use. The Respondent employed Jorgie Franks as a field sales manager[3] and Sandra Sanchez as a human resources business partner at all relevant times.

In July and August 2014,[4] Franks spoke to other employees about whether they were being adequately compensated for the number of hours they were working and asked whether they would be interested in joining her in a lawsuit against the Respondent. Sometime in August, Sanchez received a report from a manager that an employee was uncomfortable regarding a conversation with Franks about a potential lawsuit that Franks was asking employees to join.

Franks testified that on September 3, she returned a missed call from Sanchez. Sanchez asked Franks how work was going for her. Although Sanchez was "very nice," Franks was nervous and tried to be vague in her responses. According to Franks, Sanchez said she had received a complaint from one of Franks' coworkers about a lawsuit and stated, "[T]hey felt very uncomfortable with that conversation, is there anything you would like to [tell] me about now?" Franks said no and Sanchez then said: "We really don't want you calling or . . . reaching out to your coworkers to discuss these types

[1] *Natalie Flores, et al. v. Samsung Telecommunications America, LLC, et al.*, case 8:14-cv-02838-RAL-TGW

[2] On exceptions, the Respondent argues that its motion to dismiss the lawsuit and compel mediation/arbitration was a lawful exercise of its rights under the First Amendment to petition the Government for redress of grievances. The Board considered and rejected this argument in *Murphy Oil,* 361 NLRB No. 72, slip op. at 19–21.

The Respondent also argues that the complaint is time barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after each of the plaintiffs in the lawsuit signed and became subject to the arbitration agreement. We reject this argument because the Respondent continued to maintain the unlawful arbitration agreement during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's arbitration agreement, constitutes a continuing violation that is not time barred by Sec. 10(b). See *PJ Cheese, Inc.,* 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group, Inc.,* 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the arbitration agreement here, independently violates Sec. 8(a)(1). See *Murphy Oil,* supra, slip op. at 19–21. The Respondent enforced its arbitration agreement on January 9, 2015, within the relevant 6-month period before the charge was filed and served.

The judge ordered the Respondent to notify both "applicants" and "current and former employees" that the Agreement had been rescinded or revised. Because there is no allegation or evidence that any applicants were required to sign the Agreement, we shall omit the requirement that the Respondent notify applicants from the Order and notice.

[3] The field sales manager is not alleged to be a managerial or supervisory position.

[4] All subsequent dates are in 2014, unless otherwise noted.

of things." Franks testified that Sanchez reiterated that Franks had made others very uncomfortable and said that if Franks had any concerns or questions, "please come directly to me."

Sanchez testified about the conversation as follows:

> I said, I just wanted to share with you that I've gotten some feedback that a conversation that you're having with some peers is making them uncomfortable regarding some issues of a potential lawsuit. And she said that's not true, I'm not talking to anyone. I never asked her specifically if she made the comment or not. I just said, That's okay, I mean, you can talk to whoever you like . . . I wanted to make you aware that there were people that are uncomfortable with that conversation, just to share it with you. And she said, you know, I probably have vented, just normal ups and downs. And I said, "yeah, I do it too, so it's fine."

Sanchez testified that she also told Franks that if she had any concerns or if anything changed, Franks could contact her.

In early October, a human resources administrator told Sanchez that an employee complained that at a training conference Franks had reached out to him regarding a lawsuit, and he was uncomfortable about it. On October 7 Sanchez sent an email to Franks, stating:

> As you are aware, you and I spoke on September 3, 2014. In this conversation, you told me that you had no issues with Samsung and whatever conversations that you were having with your peers was simply normal "venting between peers." You also stated in this same conversation that you have not make [sic] any comments regarding a lawsuit or charge against Samsung and that you "loved working for Samsung."
>
> We recently received a separate phone call from one of the FSMs in the Southeast region stating that you had approached him about "a lawsuit you had filed with an attorney about Samsung" during the regional training the week of September 8th, 2014 which was after our conversation noted above.
>
> Has anything changed since our September 3rd conversation? I would like to reiterate again that you can always reach out directly to me with any issues/concerns. My office number is . . . . You can also submit any concerns directly to our Compliance system at compliance.sec@samsung.com.

Franks responded by email on the following day that she was not comfortable speaking about it, and that if Sanchez had any questions, she should call Franks' attorney.

II. ANALYSIS

A. The Judge's Credibility Determination

The complaint alleges that Sanchez unlawfully interrogated Franks and unlawfully instructed Franks not to discuss her lawsuit with other employees during the September 3 phone conversation. The complaint also alleges that Sanchez again interrogated Franks in Sanchez' October 7 email to Franks.

The judge found that, as to the September 3 phone conversation, neither Franks nor Sanchez was clearly more credible than the other about what was said during that conversation. As a result, the judge looked to other evidence—specifically, the October 7 email—to assist in determining which version to credit. The judge inferred that when Sanchez asked Franks in the October 7 email: "Has anything changed since our September 3 conversation?", she was asking why Franks "did not follow her request that she not discuss the lawsuit with other employees." The judge therefore credited Franks' account of the September 3 conversation.

The Respondent excepts to the judge's credibility resolution. The Respondent argues that the clear and obvious meaning of Sanchez' email question was whether anything had changed since Franks told her on September 3 that she (Franks) had no issues or concerns; therefore, the judge erred by relying on the email to credit Franks' account of the conversation. We find merit to the Respondent's exception.

Although the Board customarily does not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect, the judge's resolution here was not based on the demeanor of witnesses, but on facts established by other evidence and inferences drawn from those facts. Indeed, the judge's decision makes no reference whatsoever to demeanor. In these circumstances, the Board is as capable as the judge of analyzing the record and resolving credibility issues. See, e.g., *Herman Bros., Inc.*, 264 NLRB 439, 441 fn. 12 (1982).

In our view, the inference that the judge drew from Sanchez' email is no more persuasive than the alternative explanation of the email offered by the Respondent. Accordingly, we reject that part of the judge's reasoning. Without it, the evidence is in equipoise, and therefore does not support the judge's decision to credit Franks' testimony about the September 3 conversation over Sanchez' testimony. See *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), enfd. 272 Fed. Appx. 381 (5th Cir. 2008).

B. The 8(a)(1) Allegations

1. Instruction not to discuss lawsuit

Absent Franks' testimony about the September 3 conversation, there is no evidence supporting the complaint allegation that Sanchez instructed Franks not to talk to other employees about a lawsuit or potential lawsuit. As a result, we find that the General Counsel did not meet his burden of proving this allegation, and we dismiss it.

2. September 3 interrogation

In determining whether questioning is coercive, the Board analyzes all of the circumstances surrounding the alleged interrogation to determine whether the questioning would "reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000). See also *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The factors to be considered include the employer's background (i.e., whether there is a history of employer hostility and discrimination); the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the reply. See *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Medcare Associates*, supra at 939. Relevant circumstances can also include the relationship between the supervisor and the questioned employee and whether the employer communicated a legitimate purpose for the questions and provided assurances against reprisal. See *Gelita USA Inc.*, 352 NLRB 406, 406 (2008), affd. 356 NLRB No. 70 (2011); *Stoody Co.*, 320 NLRB 18, 18–19 (1995).

Although we have found that the judge's decision to credit Franks' testimony about the contents of the September 3 telephone conversation is not supported by the record, we nevertheless conclude, accepting Sanchez' account of the conversation, that the Respondent violated the Act by interrogating Franks about her protected concerted activity.

Although not framed as questions, we have no difficulty finding that Sanchez' statements, "sharing" with Franks that some coworkers were "uncomfortable" with a conversation about "some issues of a potential lawsuit," were calculated to elicit a response from Franks about her protected activity of bringing a collective lawsuit against the Respondent and to gain information about Franks' conversations with employees about the lawsuit. See *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. 121 Fed. Appx. 720 (9th Cir. 2005). See also *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 929 (5th Cir. 1993). Further, there is no evidence that Sanchez, a high-level management official, had ever personally contacted Franks prior to September 3; nor did Sanchez give Franks any assurances against reprisals. Franks was clearly reluctant to respond as shown by her untruthful response that it was "not true" and that she was not "talking to anyone." See *Gelita USA Inc.*, 352 NLRB at 406. Given the totality of the circumstances, we find that Sanchez' statements were coercive and would reasonably tend to interfere with employees' Section 7 rights.

3. October 7 interrogation

Contrary to the judge, we find that the Respondent again unlawfully interrogated Franks about her protected concerted activities through Sanchez' October 7 email. Although phrased as a general inquiry about whether anything had "changed," we find that Sanchez' question was in reality a second, thinly disguised question aimed at discovering the extent of Franks' protected concerted activity.[5] See *Medcare Associates,* 330 NLRB at 941–942 (finding unlawful interrogation where employer questioned employee about how she felt "about things").

Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) by unlawfully interrogating employees on September 3 and October 7.

ORDER

The National Labor Relations Board orders that the Respondent, Samsung Electronics America, Inc. f/k/a Samsung Telecommunications America, LLC, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected concerted activities.

(b) Maintaining and/or enforcing a "Mutual Agreement to Arbitrate Claims" (the Agreement) that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[5] In support of his finding that Sanchez' question was not an unlawful interrogation, the judge cited *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014), in which the Board found a question about why an employee felt she needed to obtain coworkers' signatures as witnesses to her harassment complaint was not unlawful. We find *Fresh & Easy* inapposite. The Board in *Fresh & Easy* found that the employer's question was focused on and narrowly tailored to enabling the employer to conduct a legitimate investigation into complaints by the employee and her coworkers. Unlike in *Fresh & Easy*, the Respondent here does not claim that it was conducting an investigation either into Franks' complaint or coworkers' complaints about Franks, nor did it assure Franks of its commitment to protect her from retaliation. Id., slip op. at 9.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised Agreement.

(c) In the manner set forth in the remedy section of the judge's decision, reimburse Natalie Flores and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss and compel individual arbitration.

(d) Within 14 days after service by the Region, post at its facility in El Monte, California, copies of the attached notice marked "Appendix A" and, within 14 days after service by the Region, post at its remaining facilities in the United States copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since July 27, 2014, at its facility in El Monte, California, and any current or former employees against whom the Respondent has enforced its mandatory arbitration agreement since January 9, 2015, and a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at its remaining facilities in the United States at any time since July 27, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 3, 2016

_____

Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your protected concerted activities.

WE WILL NOT maintain and/or enforce a "Mutual Agreement to Arbitrate Claims" (the Agreement) that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

[6] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL rescind the Agreement in all of its forms, or revise it in all of its forms to make clear that it does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign the Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL reimburse Natalie Flores and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss and compel individual arbitration.

SAMSUNG ELECTRONICS AMERICA, INC. F/K/A SAMSUNG TELECOMMUNICATIONS AMERICA, LLC

The Board's decision can be found at www.nlrb.gov/case/12-CA-145083 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a "Mutual Agreement to Arbitrate Claims" (the Agreement) that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Agreement in all of its forms, or revise it in all of its forms to make clear that it does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign the Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

SAMSUNG ELECTRONICS AMERICA, INC. F/K/A SAMSUNG TELECOMMUNICATIONS AMERICA, LLC

The Board's decision can be found at www.nlrb.gov/case/12-CA-145083 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Caroline Leonard, Esq. and *Christopher Zerby, Esq.,* for the General Counsel.

Mark Zelek, Esq. and *Derek Dilberian, Esq. (Morgan Lewis & Bockius LLP),* counsel for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on June 29, 2015, in Tampa, Florida. The complaint herein, which issued on April 29, 2015, was based on an unfair labor practice charge and a first and second amended charge that were filed on January 26, February 12, and March 10, 2015, by Jorgie Franks, an individual. The complaint alleges that Samsung Electronics America, Inc. f/k/a Samsung Tele-

communications America, LLC (the Respondent) since on about January 18, 2013, has maintained a "Mutual Agreement to Arbitrate Claims" (the Agreement), which employees are required to sign as a condition of employment, which stated that neither the Respondent nor the employees could initiate or prosecute any lawsuit against the other, nor could they arbitrate any action, as a class action. In other words, neither the employee nor the Employer could litigate any action against the other in any way other than by an individual arbitration. The complaint also alleges that on about September 3, 2014,[1] the Respondent, by Sandra Sanchez, its human resources business partner, and an admitted agent of the Respondent within the meaning of Section 2(13) of the National Labor Relations Act (the Act), instructed employees not to talk to other employees about a lawsuit or potential lawsuit related to compensation and working conditions, and interrogated employees about their concerted activities, and on about October 7 Sanchez, by email, interrogated employees about their concerted activities.

The complaint further alleges that on about November 13, Franks and other employees "engaged in concerted activities for the purpose of mutual aid and protection" by filing a nationwide collective action complaint and demand for a jury trial against the Respondent, later joined by the Respondent's employee Natalie Flores, alleging violations of the Fair Labor Standard Act, and that on various dates starting on about December 11, Respondent demanded that the employees participating in the lawsuit withdraw the lawsuit and on about January 9, 2015, the Respondent filed a defendant's motion to dismiss and compel mediation/arbitration. It is alleged that by this conduct the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

Since about January 18, 2013, the Respondent has required employees to sign the 10 Agreement as a condition of employment. It is alleged that on about September 3, Sanchez instructed employees not to talk to other employees about a lawsuit or potential lawsuit related to compensation and working conditions. Franks testified that in about July and August she spoke to other employees and asked them if they thought that they were working too many hours compared to what they were being paid for and, if so, would they be interested in joining her in a lawsuit against the Respondent. She also testified that on one occasion she attended a meeting of employees that was presided over by Sanchez. Prior to the meeting her manager told her and the others attending "to be on our best behavior and don't . . . cause any problems." Sanchez spoke of the Respondent's policies and what qualities they looked for in selecting people for promotions. When she asked if there were any questions, Franks asked what a typical day was like because it felt like she was working more than 40 hours a week, and Sanchez said that Samsung was a great company and that they should be happy working there. Although she felt that Sanchez had not answered her question, she did not pursue it further because of what her manager had said.

Franks testified further that on September 3, Sanchez called her and she missed the call so she called Sanchez, who asked her how work was going for her. Franks testified that she was nervous and tried to be vague in her responses and Sanchez said, "[B]efore you jump off the phone, let me talk to you about the real issue, why I called. I received a complaint from one of your coworkers about a lawsuit. They felt very uncomfortable with that conversation, is there anything you would like to me [sic] about now?" Franks said no and Sanchez then said: "We really don't want you calling or reaching out to your coworkers to discuss these types of things." Franks replied that she talks to coworkers about a lot of subjects and Sanchez replied that she made the others very uncomfortable and if she had any concerns or questions, she should go directly to her. On cross-examination she was asked if Sanchez told her that she should not talk about the lawsuit and she answered, "[N]o." After this conversation, Franks called one of her coworkers and told her what Sanchez had said.

Sanchez is the HR business partner for the Respondent and, prior to her employment with the Respondent, was employed by Verizon, which has unionized employees, and McAfee, which does not; she testified that she is aware of the concept of protected, concerted activities. Sometime in about August, she was told by David Daugherty, a regional manager for the Respondent, that Eric Maddox, one of his managers, told him that one of his employees was uncomfortable regarding a conversation with Franks about a potential lawsuit that she was asking other employees to join. On that day or the next day she called Franks:

> I said that I just wanted to share with you that I've gotten some feedback that a conversation that you're having with some peers is making them uncomfortable regarding some issues of a potential lawsuit. And she said that's not true, I'm not talking to anyone. I never asked her specifically if she made the comment or not. I just said, That's okay, I mean, you can talk to whoever you like . . . I wanted to make you aware that there were people that are uncomfortable with that conversation, just to share it with you. And she said, you know, I probably have vented, just normal ups and downs. And I said, "yeah, I do it too, so it's fine."

That was the extent of the conversation and she testified that she did not tell Franks not to discuss lawsuits with other employees or interrogate her about the lawsuit. In about early October an HR administrator told her that an employee complained that at a training conference Franks "reached out to him regarding a lawsuit" and he was uncomfortable about it. On October 7, Sanchez sent an email to Franks, stating:

> As you are aware, you and I spoke on September 3, 2014. In this conversation, you told me that you had no issues with Samsung and whatever conversations that you were having with your peers was simply normal "venting between peers." You also stated in that same conversation that you have not

[1] Unless indicated otherwise, all dates referred to here relate to the year 2014.

> make [sic] any comments regarding a lawsuit or charge against Samsung and that you "loved working for Samsung."
>
> We recently received a separate phone call from one of the FSMs in the Southeast region stating that you had approached him about "a lawsuit you had filed with an attorney about Samsung" during the regional training the week of September 8, 2014 which was after our conversation noted above.
>
> Has anything changed since our September 3rd conversation? I would like to reiterate again that you can always reach out directly to me with any issues/concerns.

Franks responded by email on the following day that she was not comfortable speaking about it, and that if Sanchez had any questions, she should call Franks' attorney.

Jamie Youngman has been employed by the Respondent since October 2012, and has known Franks since about that time. She met her at a convention when she first began her employment with the Respondent and has communicated with her on Facebook since that time, generally about social issues and children, but also occasionally about work issues, like the company getting stricter with "slackers" and their work hours. During one conversation, Franks asked for her telephone number and she gave it to her and Franks called in the evening on August 30. After some casual conversation, Franks said that she spoke to her boyfriend and they determined that with the hours that she was working, she was being paid minimum wage. She said that she had contacted a lawyer who agreed to take her case, "I've given them a list of names and . . . I'm reaching out to you to see if you will take part in this case." Youngman testified: "And I said no, no, no, no, no . . . don't give them my name, call them back, tell them I don't want on this list, I don't want any . . . part in this, like I'm fine. My retail hours, my hours, it's all been fine to me. Like I love it where I'm at and the way that it is." Because she was "panic-stricken" she immediately called Eric Maddox, her district manager, and told him of Franks' phone call, that Franks wanted to file a lawsuit against the company, and that Franks gave her name to the lawyers. Youngman told him that she wanted the company to know that she didn't want to be on the list and didn't want to be affiliated with it. When she didn't hear back from Maddox, she called Sanchez about a week later, on September 8. She told her that Franks spoke to her about filing a lawsuit against the company and that she didn't want to be a part of it, and she asked Sanchez if she should unfriend Franks on Facebook and Sanchez asked if they were friends on Facebook and she said that they were. Sanchez said that if she was comfortable with her being her friend, then she shouldn't unfriend her.

The parties stipulated to the following:

> From at least January 13, 2013, until at least January 2015, Respondent STA managers required newly hired employees to sign a California or non-California version of a Mutual Agreement to Arbitrate Claims (the Agreement) as a condition of employment. From at least January 13, 2013, until at least January 2015, Agreements have been signed by Respondent STA's newly hired employees at Respondent's locations within: the United States and its territories, including locations in 49 states, and since January 2015. Respondent has continued to maintain these signed Agreements.
>
> At all material times, the non-California and California versions of the Agreement have each included the following provision:
>
> CLAIMS COVERED BY THE AGREEMENT
> Except as otherwise provided in this Agreement, both the Company and I agree that neither of us shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge of discrimination to the Equal Employment Opportunity Commission or a similar fair employment practices agency or an administrative charge within the jurisdiction of the National Labor Relations Board) in any way related to any claim covered by this Agreement. Moreover, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions) or in a representative capacity on behalf of a class of persons or the general public.
>
> In January 2013, Respondent hired Scott Faia (Faia) as a Field Sales Manager in California. Faia worked in that position from on or about January 18, 2013 until June 14, 2013.
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> In January 2013, Respondent hired Natalie Flores (Flores) as a Field Sales Manager in California. Flores worked in that position from on or about January 21, 2013 until August 23, 2013.
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> In January 2013, Respondent hired Amberlee Milliken (Milliken) as a Field Sales Manager in Texas. Milliken worked in that position from on or about January 21, 2013 until December 6, 2013.
>
> In January 2013, Respondent hired Richard Ojeh (Ojeh) as a Field Sales Manager in California. Ojeh worked in that position from on or about January 23, 2013, until August 26, 2014.
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> In January 2013, Respondent hired John Sinopoli (Sinopoli) as a Field Sales Manager in New York. Sinopoli worked in that position from on or about January 21, 2013 until September 18, 2013.
>
> On or about November 13, 2014 Charging Party as lead plaintiff and Faia Milliken and Ojeh, as opt-in plaintiffs, filed the "Nationwide Collective Action Complaint and Demand for Jury Trial" (the Complaint) in the United States District Court Middle District of Florida, Tampa Division, (Jorgie Franks. et al. v. Samsung Telecommunications America. LLC, hereinafter referred to as "the Lawsuit") along with a "Notice of Filing Notice of Consent to Join" and "Notice of Consent to Join" signed by the Charging Party. A "Notice of Consent to Join" and "Consent to Join Collective Action and Be Represented by Morgan and Morgan P.A." was filed on behalf of Richard Ojeh on November 20, 2014. A "Notice of Consent to Join" and "Consent to Join Collective Action and Be Represented by Morgan and Morgan, P.A." was filed on behalf of Amberlee Milliken on November 25, 2014. A "Notice of Consent to Join" and "Consent to Join Collective Action and

Be Represented by Morgan and Morgan, P.A." was filed on behalf of Scott Faia on December 2, 2014. The Complaint alleges that Respondent violated the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 et. seq by failing to pay overtime wages to the Charging Party and other, similarly-situated Field Sales Managers employed by Respondent, including Faia, Milliken, and Ojeh, and by failing to maintain adequate records.

On or about December 11, 2014, Natalie Flores (Flores) filed a "Consent to Join Collective Action and Be Represented by Morgan and Morgan P.A." and a "Notice of Filing Notice of Consent to Join" the Lawsuit.

On or about December 11, 2014, in a letter from Respondent counsel Mark E. Zelek (Zelek) of Morgan Lewis & Beckius LLP to the Charging Party counsel Andrew R. Frisch (Frisch) of Morgan & Morgan, P.A., dated December 11, 2014, also served on or about December 11, 2014 at 6:24p.m. as an attachment to an electronic mail message from Respondent counsel Derek J. Dilberian, Esq. of Morgan Lewis & Beckius LLP to the Charging Party counsel Frisch, Respondent demanded that the Complaint be withdrawn, and that the plaintiffs in the Lawsuit individually mediate and/or arbitrate their claims, because the Charging Party and the opt-in plaintiffs had signed copies of the Agreement.

On or about December 15, 2014, at 10:24 a.m., in an electronic mail message from Respondent's counsel Zelek to Charging Party counsel Frisch, Respondent requested a response to its letter of December 11, 2014.

On or about December 16, 2014, the Complaint was amended to name Flores as the lead plaintiff, with the Charging Party remaining a party to the action as an opt-in plaintiff.

The caption of the Lawsuit was changed to Natalie Flores. et al. v. Samsung Telecommunications America, LLC.

On or about December 16, 2014, Sinopoli filed a "Consent to Join Collective Action and Be Represented by Morgan and Morgan, P.A." and "Notice of Filing Notice of Consent to Join" the Lawsuit.

On or about December 17, 2014, in a letter from Respondent counsel Zelek to Charging Party counsel Frisch, dated December 17, 2014, Respondent demanded that the Amended Complaint be withdrawn and that the parties individually mediate and/or arbitrate their claims, because Flores and the opt-in plaintiffs, including Charging Party, had signed copies of the Agreement.

On or about December 22, 2014 at 12:18 p.m., in an electronic mail message from Charging Party counsel Frisch to Respondent counsel Zelek, the Charging Party replied to Respondent's letters of December 11 and December 17, 2014.

On or about December 29, 2014, at 4:19 p.m., in an electronic mail message from Respondent counsel Zelek to Charging Party counsel Frisch dated December 29, 2014, Respondent replied to the Charging Party's electronic mail message of December 22, 2014.

On or about December 29,2014, at 6.05 p.m., in an electronic mail message from Charging Party counsel Frisch to Respondent counsel Zelek, the Charging Party replied to Respondent's electronic mail message of December 29, 2014.

On or about December 31, 2014, at 10:56 a.m., by electronic mail message from Respondent counsel Zelek to Charging Party counsel Frisch, dated December 31, 2014, Respondent replied to the Charging Party's electronic mail message of December 29, 2014, and reasserted that the parties must individually mediate and/or arbitrate their claims, because Flores and the opt-in plaintiffs, including charging party, had signed copies of the Agreement.

On or about January 9, 2015, Respondent filed "Defendant's Motion to Dismiss and Compel Mediation/Arbitration, with Incorporated Memorandum of Law" (Respondent's Motion) in the Lawsuit.

On or about January 27, 2015, Natalie Flores stipulated to the dismissal of the Lawsuit without prejudice.

III. ANALYSIS

The initial issue is whether the Respondent's Mutual Agreement to Arbitrate Claims, which the Respondent's newly hired employees have been required to sign since about January 13, 2013, violates the Act. Although the courts have rejected the Board's reasoning in *Horton* and later cases, as I am required to follow Board law unless, and until, reversed by the Supreme Court, I find that pursuant to Board law, it clearly does. The Board's decision in *D. R. Horton, Inc.,* 357 NLRB No. 184 (2004), applied the test as set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), that if the rule explicitly restricts Section 7 activities, it is unlawful. If not, a violation is dependent upon showing one of the following: the rule has been applied to restrict the exercise of those activities or employees would reasonably construe the rule to prohibit protected activity. In finding a violation in *Horton,* supra, the Board stated (slip op. at 12): "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial" as a condition of employment. Although the Agreement specifically excludes from its coverage claims before the Board and the EEOC, the Board's findings in *Horton* were not based solely upon the fact that the employees were precluded from filing charges with the Board; rather, it was because the employees were limited to individual arbitrations, rather than any collective action. If there was any doubt about this issue, there could be none after the Board's decisions in *Murphy Oil, USA, Inc.,* 361 NLRB No. 72 (2014), and *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27 (2015). *Murphy Oil* stated (at slip op. at 2) "To be clear, the NLRA does not create a right to class certification or the equivalent, but as the *D. R. Horton* Board explained, it does create a right to pursue joint, class or collective claims if and as available, without the interference of an employer-imposed restraint." As the Respondent's rule restricts the employees' right to pursue joint, class, or collective action, even while permitting Board charges, it violates Section 8(a)(1) of the Act.

The parties stipulated that on about December 11, 17, and 31, counsel for the Respondent wrote to counsel for the plaintiffs in the lawsuit demanding that the complaint be withdrawn and that the plaintiffs in the lawsuit individually mediate and/or arbitrate their claims because they had signed the Agreement. In addition, on about January 9, 2015, counsel for the Respondent filed "Defendant's Motion to Dismiss and Compel Mediation/Arbitration with Incorporated Memorandum of Law," seeking to have the plaintiffs' lawsuit dismissed. In *Cellular Sales,* supra (at slip op. at 2), with similar language in *Murphy Oil,* supra, (at slip op. at 2), the Board stated: "It is equally well established that an employer's enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, independently violates Section 8(a)(1)." By writing to their counsel demanding that the plaintiffs withdraw their lawsuit, and by filing a motion to dismiss it, the Respondent further violated Section 8(a)(1) of the Act.

The remaining allegations relate to Sanchez' conversation with Franks on September 3, and her email to her on October 7. It is alleged that in the September 3 conversation, Sanchez instructed Franks not to discuss the lawsuit with other employees and interrogated her regarding her concerted activities, the lawsuit. Franks testified that Sanchez told her that there was a complaint from a coworker who felt uncomfortable about a conversation Franks had with the employee about the lawsuit and then asked Franks if there was anything that she would like to ask her, and Franks answered no. Sanchez then said that they didn't want her reaching out or calling other employees "to discuss these types of things," although when asked if Sanchez told her that she should not talk about the lawsuit, she answered, no. When Franks replied that she speaks to her coworkers about a lot of subjects, Sanchez answered that she made them uncomfortable and if she had any concerns or questions, she should come directly to her. Sanchez, on the other hand, testified that she told Franks that a conversation that she had with some peers about a potential lawsuit made them uncomfortable, and when Franks denied it, she told her that she could talk to anyone that she liked, but that she, Sanchez, wanted her to be aware that some people were uncomfortable with the conversation. This is a difficult credibility determination as neither Franks nor Sanchez was clearly more credible than the other. With such a close issue it is necessary to examine all the facts, even subsequent facts, and I note that Sanchez' October 7 email to Franks states only that after their September 3 conversation, another employee called to state that Franks had approached him about her lawsuit; however, the email does not state that he said that he felt uncomfortable about the conversation and, yet, Sanchez asked: "Has anything changed since our September 3 conversation?" The inference is that Sanchez was asking her why she did not follow her request that she not discuss the lawsuit with other employees, and I so find. I therefore credit Franks and find that Sanchez told her that they really didn't want her speaking to other employees "to discuss these types of things." This is an indirect way of telling her not to talk to other employees about the lawsuit, and I therefore find that it violates Section 8(a)(1) of the Act.

It is further alleged that Sanchez interrogated her in violation of Section 8(a)(1) of the Act by asking her in that conversation if there was anything that she wanted to talk to her about and by stating in her October 7 email: "Has anything changed since our September 3rd conversation?" The test for determining whether an employer's interrogation of an employee violates the Act is whether, under the circumstances, it would reasonably tend to restrain or interfere with the employees' exercise of the rights guaranteed them by the Act. Relevant factors to be considered include the background leading to the interrogation, the nature of the information sought, and the identity of the questioner. *United Services Automobile Assn.,* 340 NLRB 784, 786 (2003); *Stevens Creek Chrysler Jeep Dodge, Inc.,* 353 NLRB 1294, 1295 (2009). I find that Sanchez' question to Franks on September 3 whether there was anything that she wanted to talk to her about, does not violate the Act. Sanchez was already aware that she was speaking to other employees about the lawsuit so the question was not meant to elicit any information that could be used against her and would not reasonably restrain her in continuing to solicit other employees to join her in a lawsuit. I therefore find that this question in the September 3 conversation did not violate the Act.

As for the October 7 email, the initial paragraph of the email summarizes their September 3 conversation (as she testified about it), while the paragraph following states that she received a phone call from an employee saying that Franks had approached him about a lawsuit that she had filed against the company. The final paragraph, allegedly the unlawful one, states: "Has anything changed since our September 3rd conversation? I would like to reiterate again that you can always reach out directly to me with any issues/concerns." This email served as a followup to their September 3 conversation where Sanchez told Franks that some of her fellow employees felt uncomfortable about her soliciting them to join her lawsuit. After receiving a call from Youngman or another employee saying that he/she felt uncomfortable about a call from Franks about joining her lawsuit, she asked Franks if anything had changed since the September 3 telephone call and that she could always speak to her about concerns or issues that she had. As this email was in response to a call that she had received complaining about Franks' solicitations, contained no threats or promises of benefit, and would not tend to interfere with Franks' right to maintain the lawsuit, I find that it does not violate the Act and recommend that it be dismissed. *Rossmore House,* 269 NLRB 1176 (1984); *Fresh & Easy Neighborhood Market,* 361 NLRB No. 12 (2014).

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement and/or enforcing a mandatory arbitration agreement under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and by telling employees not to discuss their lawsuit with other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

3. It is recommended that the allegations that the Respondent, by Sanchez, violated the Act by interrogating Franks in their September 3 telephone conversation, and in her October 7 email to Franks, be dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the Board's usual practice in cases involving unlawful litigation, I recommend that the Respondent be ordered to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest[2] incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration. I also recommend that the Respondent be ordered to rescind or revise the Agreement, and to notify employees that it has done so. As Flores stipulated to the dismissal of the lawsuit, there is no need to inform the district court that it no longer opposes the plaintiffs' claims on the basis of the Agreement.

Upon the foregoing findings of fact, conclusions of law, and based upon the entire record, I issued the following recommended[3]

Interest shall be computed in the manner prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

ORDER

The Respondent, Samsung Electronics America, Inc. f/k/a Samsung Telecommunications America, LLC, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Telling employees not to discuss their lawsuits with other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Mutual Agreement to Arbitrate Claims in all of its forms, to make clear to employees that it does not constitute a waiver of their right to maintain employment related joint, class, .or collective actions in all forums.

(b) Notify all applicants and current and former employees who were required to sign the Mutual Agreement to Arbitrate Claims that it has been rescinded or revised and, if revised, provide them a copy of the revised Agreement.

(c) In the manner set forth in the remedy section of this decision, reimburse the plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss their wage claims and compel individual arbitration.

(d) Within 14 days after service by the Region, post at each of its facilities in the United States, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by either the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that allegations not specifically found are hereby dismissed.

Dated, Washington, D.C. August 18, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires you, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

[2] Interest shall be computed in the manner prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT tell you not to discuss your lawsuits with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Mutual Agreement to Arbitrate Claims (the Agreement) or revise it to make clear that it does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums and WE WILL notify all applicants and current and former employees who were required to sign the Agreement that it has been rescinded or revised and, if revised, provide them with a copy of the revised Agreement.

WE WILL notify Natalie Flores and her fellow employees who filed their wage claim in the United States District Court for the Middle District of Florida, Tampa Division, that we have rescinded or revised the mandatory arbitration agreements upon which we based our motion to dismiss their claim and to compel individual arbitration, and WE WILL reimburse Flores and her fellow employees for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss their wage claims and compel individual arbitration.

SAMSUNG ELECTRONICS AMERICA, INC. F/K/A SAMSUNG TELECOMMUNICATIONS AMERICA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-145083 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.